

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: December 22, 2017
TO: Councilmember Georgette Gomez, Council District 9
FROM: City Attorney
SUBJECT: Police Chief Recruitment and Selection Process

INTRODUCTION

On December 18, 2017, you requested a legal opinion from our Office regarding the Mayor's current recruitment for Chief of the San Diego Police Department.

The hiring process for the Chief of Police is described in San Diego Charter (Charter) section 57, which grants the Mayor discretion to appoint the Chief of Police, subject to confirmation by a majority of the Council of the City of San Diego (Council). The Mayor determines the manner and means by which the recruitment occurs, and selects a qualified applicant to bring to the Council for approval. The Council approves or rejects the Mayor's proposed appointment at a properly noticed Council meeting.

Specifically, you asked whether any local, state, or federal laws prohibit the release of the following information: (1) the names of individuals serving on the community selection panel, and (2) the selection panels' recommendations, evaluation, and rankings. This memorandum responds to both questions.

ANALYSIS

I. THE IDENTITIES OF THE COMMUNITY SELECTION PANEL MEMBERS ARE LIKELY NOT CONFIDENTIAL.

Individuals have a right to privacy under the California Constitution, but this right is not absolute. A claim for violation of the right to privacy requires: (1) a legally protected privacy interest, (2) an objectively reasonable expectation of privacy under the circumstances, and (3) a serious invasion of that privacy interest in both its scope and nature." *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 338 (2007). If these elements are met, a court will balance the privacy interest against countervailing interests. *City of Los Angeles v. Los Angeles County Employee Relations Commission*, 56 Cal. 4th 905, 926 (2013).

Information that may result in “unjustified embarrassment or indignity” under “well-established social norms” may constitute a legally protected privacy interest. *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 35 (1994). Here, no precedent suggests that disclosing the identity of a member serving on a public community panel would embarrass that member or reveal any information otherwise considered confidential under social norms. In addition, recruitment and hiring for high profile positions such as this often occur in the public eye, which further diminishes the argument that the community selection panel members have an expectation of privacy.

This Office has not been provided, and is not otherwise aware of, any information that would suggest that these members have a reasonable expectation of privacy in their identity during the selection process. However, our Office is not privy to all communications between the Mayor’s Office and the selection panel members and, therefore, cannot speculate as to whether any communications or representations may have created an objective expectation of privacy. *See Hill*, 7 Cal. 4th at 36 (“customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy.”).

Nonetheless, even if circumstances exist that would create a reasonable expectation of privacy in the identity of these members, such a right to privacy is not absolute and would have to be balanced against the public’s competing interest in disclosure. *Commission On Peace Officer Standards And Training v. Superior Court*, 42 Cal. 4th 278, 300 (2007) (“The public has a legitimate interest not only in the conduct of individual officers, but also in how the Commission and local law enforcement agencies conduct the public’s business.”) Since courts have recognized a strong public interest in law enforcement business, it is unlikely that a member’s reasonable expectation of privacy, if any, could outweigh the public’s countervailing interest in learning that member’s identity.

II. THE CANDIDATES FOR POLICE CHIEF LIKELY HAVE AN EXPECTATION OF PRIVACY IN THEIR IDENTITY.

A. Candidate Identity

The right to privacy under the California Constitution prevents employers from collecting information on applicants and then unnecessarily disseminating or misusing that information. *See, e.g., Hill*, 7 Cal. 4th at 17. Additionally, individuals have a general right to privacy in their work history and, specifically, state law mandates the confidentiality of peace officer personnel records. *Alch v. Superior Court*, 165 Cal. App. 4th 1412, 1426-1428 (2008); Cal. Penal Code § 832.7.

Here, there is a risk that disclosing the identities of the applicants for Chief of Police this early in the process would subject the applicants to invasive scrutiny and potentially compromise the integrity of the Mayor’s selection process. Thus, if dissemination of this information is to occur, applicants should be asked to sign a waiver agreeing to the disclosure of their identities. Such a waiver is best obtained at the outset of the process.

